IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

EXECUTIVE LEASING CORPORATION; MANUEL GONZALEZ GIERBOLINI and personally and on behalf of the CONJUGAL PARTNERSHIP constituted between them,

Plaintiffs

v.

BANCO POPULAR DE PUERTO RICO AND BANPONCE CORP.,

Defendant

CIVIL 89-0221 (HL)(JA)

OPINION AND ORDER

Plaintiffs Executive Leasing Corporation (hereinafter "Executive"), Manuel Gonzalez Gierbolini and Luz Iraida Gonzalez, both personally and on behalf of their conjugal partnership, filed this action against defendants Banco Popular de Puerto Rico and BanPonce Corp. (hereinafter "Popular").

This case arises out of a loan agreement between Popular and Executive and all the events that led to the subsequent termination of the lender-borrower relationship. Executive invokes federal question and supplemental jurisdiction. The only federal claim here is based on the anti-tying provisions of the Bank Holding Company Act (hereinafter "the Act"), 12 U.S.C. § 1972. In the amended complaint (Docket No. 65) Executive alleges, in sum, the following: On May 1983, Executive and Popular entered into a loan agreement whereby Popular granted Executive a line of credit collateralized by an assignment of accounts receivable covering the vehicle lease

contracts generated by Executive. As a condition to the loan, Popular required that part of the loan be used to pay off a then existing line of credit which Executive had with another bank, Banco Central Corp. Popular also prohibited Executive from doing business with Banco Central or any other banking institution.

On February 1986, Executive offered to sell Popular a group of lease contracts at a discount in order to release a substantial amount of its line of credit for further use on its business development. Subsequently, Popular terminated the negotiations of this sale alleging not having the internal operational facilities to manage the contracts. Then, on April 1986, Executive sold the contracts to another financial institution. Nevertheless, Executive still paid Popular the amounts owed in said lease contracts, thus releasing a substantial amount of its line of credit for further growth.

On May 3, 1986, the agreement was amended to provide the manner in which Popular would bill and collect from Executive, which was just a written provision of what already was the practice among the parties. Said practice consisted, in sum, in the following: 1) Popular would debit Executive's checking account; 2) fifteen days later, Popular would send Executive a detailed computation of the amount debited; 3) Executive would make a thorough review; and 4) Executive would make arrangements to cover any amount overdrawn, if necessary.

However, in July 1986, Popular notified Executive that henceforth it would not debit Executive's account but would send an invoice which Executive would be expected to pay promptly. This new system made it impossible for Executive to pay the amounts due. This change in billing was unilaterally implemented by Popular in contravention of the agreement with the improper purpose of creating the appearance that Executive was falling in arrears in its payments in order to justify getting Executive out of business upon acquiring Velco, one of Executive's competitors, on November 1986.

In April 1987, Executive sold to an unrelated party a second group of lease contracts and paid Popular the amount owed on said contracts, thereby liberating its line of credit for further growth. However, Popular, arbitrarily and without prior notice, refused to extend new credit to Executive with respect to new vehicle lease contracts

generated by Executive. This was a subterfuge employed by Popular to: 1) slow Executive's business, thereby improving the relative competitive position of Popular's affiliate, Velco; and 2) weaken Executive to the point that it would have to surrender its lease contracts for the benefit of Velco. Popular only extended credit for a few lease contracts in order to keep Executive "on the hook" while Popular allegedly reviewed Executive's line of credit so that Executive would not seek financing from another bank.

An excuse for not extending credit was that Executive's payments were overdue. This was not the practice between the parties, and, in any event, Popular had an excess collateral over debt at all times. This resulted in a reduction of $819,083 in the value of Executive's contracts.

As was foreseeable, Executive had to use such funds as it had available to pay the few vehicles it had purchased and, eventually, it fell behind in its regular payments to Popular. In August 1987, Popular informed Executive that it would not approve new credits until Executive's line of credit had been renewed by Popular's board of directors. Executive requested a long term loan in order to pay the outstanding amount. On November 12, 1987, Popular informed Executive that its loan had been approved and its credit renewed. Three weeks later, Popular notified Executive otherwise, and gave Executive thirty days to pay amounts owed or its property would be foreclosed. This period was extended for another fifteen days, but it was impossible for Executive to obtain financing from another institution in such a short period of time.

Faced with this situation, Mr. and Mrs. Gonzalez started negotiations with Velco to sell Executive. Velco originally had interest in acquiring Executive. However, after it was bought by Popular, it backed out and expressed having an interest in acquiring only the lease contracts, contrary to earlier negotiations.

Executive requested again extensions of time to pay, but Popular denied extension. Executive made several offers to Popular to work out the loan, which offers were rejected. Rather, Popular imposed on Executive the condition to deliver properties with an appraised value of $ 1,822,038 to satisfy a debt of 1,427,595 [sic]. This condition included Executive losing control of its clients. Popular coerced

Executive to accept the only solution whereby Popular would not foreclose: the transfer of all of Executive's lease contracts, including those over which Popular had no previous assignment, at an arbitrary discount rate, delivering to Popular absolute control of Executive's clients for the benefit of Velco. Several agreements were signed to deliver additional property to work out the loan, for a remaining outstanding balance of $131,013.51 which amount had to be paid within ninety days. Said amount was paid when due. Soon thereafter, Popular transferred to Velco the contracts and the corresponding clients were taken from Executive.

Executive alleges that Popular: 1) violated the anti-tying provision of the Act by: a) requiring Executive to pay and close the line of credit with Banco Central Corp. and in the future to abstain from doing business with any other bank; and b) requiring during the work out of the loan the sale of twenty lease contracts upon which it had no previous lien and the main assets of Executive for the benefit of Velco, which is an act not normally related to the ordinary course of banking business in connection with a loan; 2) breached its verbal commitment to lend; and 3) breached its fiduciary duty to Executive as borrower of the bank by forcing Executive to sell its lease contracts and to surrender additional property and benefits.

Popular filed a motion for summary judgment with a memorandum of law, a statement of uncontested facts and exhibits (Docket No. 91) alleging that the federal claim should be dismissed since: 1) Popular did not "extend credit" to Executive within the meaning of the Act; 2) the lease contracts and accounts receivable Executive delivered to Popular as partial payment in kind are not "additional property" for purposes of the Act; and 3) the payment of a loan is a "traditional banking practice" protected by the Act. It further alleges that the pendent claims should also be dismissed thereafter for lack of jurisdiction.

Executive filed an opposition to the motion for summary judgment with a memorandum of law, a statement of contested facts and exhibits (Docket No. 104) alleging that: 1) Popular imposed on Executive a prohibited tie as a "condition or requirement" to an "extension of credit" in order to obtain from Executive "additional credit, property or service" within the meaning of the Act; 2) the prohibited

tie imposed by Popular was "unusual" and not a "traditional banking practice" within the meaning of the Act; 3) each plaintiff is a "person" within the meaning of the Act; 4) the affirmative defenses raised by plaintiffs are unavailable to defendants under the Act; and 5) all of defendants' alleged uncontested facts have been fully controverted.

Popular filed a reply (Docket No. 110) alleging that: 1) Popular's extensions of time to allow Executive to pay its debt is not an "extension of credit" within the meaning of the Act; 2) the agreement to terminate the loan is not an "extension of credit" within the meaning of the Act; 3) a payment of a loan cannot be considered as "additional property" under the Act; 4) the lease contracts and accounts receivable delivered by Executive were part of the collateral of the loan agreement; and 5) the loan agreement did not contain an exclusive dealing condition.

Executive filed a sur-reply (Docket No. 113) arguing that Popular's arguments in its reply are erroneous. Popular requested leave of the court and filed a response to the sur-reply (Docket No. 116) alleging that Executive's new allegation that the loan agreement was a "simulation" should not be considered by the court since it was raised at the sur-reply for the first time and since a party to a simulated contract cannot impugn the agreement. Leave to file the response to the sur-reply is hereby granted. Executive filed a motion requesting that Popular's response to the sur-reply be stricken from the record (Docket No. 117). Said request is hereby denied.

In order to grant summary judgment, I must first find that there is no genuine issue as to any material fact, and, then, that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56 (c); Celotex Corp. v. Catrett, 477 U.S. 317, 324-25 (1986); Lewis v. Gillette, Co., No. 93-1934, slip op. at 2 (1st Cir. Apr. 26, 1994); Febus-Rodriguez v. Betancourt-Lebron, 14 F.3d 87, 90-91 (1st Cir. 1994).

These findings are, nevertheless, regulated by a shift in burden. The moving party "must put the ball in play, averring 'an absence of evidence to support the nonmoving party's case.'" Maldonado-Denis v. Castillo-Rodriguez, No. 93-2012, slip op. at 3 (1st Cir. May 6, 1994). Once the moving party satisfies this requirement, the burden then shifts to the nonmoving party to establish the existence of at least one genuine issue of fact to affect the outcome of the litigation

and from which a reasonable trier of facts could find for the nonmoving party. Maldonado-Denis v. Castillo-Rodriguez, No. 93-2012, slip op. at 3; Febus-Rodriguez v. Betancourt-Lebron, 14 F.3d at 91. A genuine issue exists if there is sufficient evidence supporting the claimed factual dispute to require a choice between the parties' differing versions of the truth at trial. LeBlanc v. Great. Am. Ins. Co., 6 F.3d 836, 841 (1st Cir. 1993). A fact is material if it might affect the outcome of the suit under the governing law, and a dispute is genuine if a reasonable jury could resolve it in favor of the nonmoving party. Maldonado-Denis v. Castillo-Rodriguez, No. 93-2012, slip op. at 3.

To oppose the motion for summary judgment, the nonmoving party may not rest upon mere allegations or denials. It must present definite and competent evidence in support which cannot be conjectural or problematic and must have substance "in the sense that it limns differing versions of the truth which a factfinder must resolve at an ensuing trial." LeBlanc v. Great Am. Ins. Co., 6 F.3d at 841.

In this district, Local Rule 311.12 assists the court in dealing with these mechanics. It requires the moving party to file a separate statement of material facts that it alleges are not in issue, with specific references to the record. It requires the nonmoving party to file a separate statement of material facts that it alleges are in issue. Compliance with this rule is very critical since when entertaining the movant's arguments, the court will only consider those facts alleged in its statement, and failure of the non-movant to comply with the rule results in that the movant's statement is taken as admitted. See United States District Court for the District of Puerto Rico, Local Rules of the Court, Rule 311(12) (Butterworth de Puerto Rico (1994).

As the First Circuit stated, there is an "important dimensions" to summary judgment practice. Summary judgment "must be decided on the record as it stands, not on litigants' visions of what the facts might some day reveal." Maldonado-Denis v. Castillo-Rodriguez, No. 93-2012, slip op. at 3. "Brash conjecture, coupled with earnest hope that something concrete will eventually materialize, is insufficient to block summary judgment." Id.

Popular requests summary judgment dismissing the federal claim which is based on 12 U.S.C. § 1972. Section 1972 of the Bank Hold-

ing Company Act states in relevant parts:

> (1) **A bank shall not** in any manner **extend credit . . . on the condition** or requirement—
>
> (A) that the customer shall **obtain** some **additional** credit, **property**, or service **from such bank** other than a loan, discount, deposit or trust service;
>
> (B) that the customer shall **obtain** some **additional** credit, **property** or service from a **bank holding company of such bank, or from any other subsidiary** of such bank holding company;
>
> (C) that the customer **provide** some **additional** credit, **property** or service to such **bank other than those related to and usually provided in connection with a loan**, discount deposit or trust service;
>
> (D) that the customer **provide** some **additional** credit, **property** or service to a **bank holding company of such bank, or to any other subsidiary** of such bank holding company; or
>
> (E) that the customer **shall not obtain** some **other credit**, property or service **from a competitor of such bank**, a bank holding company of such bank, or any subsidiary of such bank holding company, **other than a condition or requirement that such bank shall reasonably impose in a credit transaction** to assure the soundness of the credit.

Title 12 U.S.C. 1972(l) (emphasis mine).

The purpose of this Act is to prohibit anti-competitive practices which require bank customers to accept or provide some other product or refrain from dealing with other parties in order to obtain the bank product or services they desire. S. Rep. No. 1084, 91st Cong.,

2d Sess. 17 (1970) ; B.C. Recreational Indus. v. First Nat'l Bank of Boston, 639 F.2d 828, 832 (1st Cir. 1981).

In order to have a cause of action under this section, plaintiff must allege and establish two elements: First, the claim must be based on an extension of credit. Second, the bank must have agreed to extend credit on the condition that the customer obtain or provide some additional property from or to the bank or that the customer not obtain some other credit or property from a competitor of such bank. See id.

Even if a particular arrangement is a prohibited tie-in, it would still be exempt form [sic] the Act if it falls within the range of "appropriate traditional banking practices." B.C. Recreational Indus. v. First Nat'l Bank of Boston, 639 F.2d at 832. There are three exemptions to these prohibitions under which there is no liability, and they are: 1) that the additional property the customer must obtain from the bank is related to the loan; 2) that the additional property the customer must provide to the bank is related to and usually provided in connection with a loan; or 3) that the condition of not obtaining credit from another bank is a condition that such bank shall reasonably impose to assure the soundness of the credit. See 12 U.S.C. § 1972(1); see Flags I, Inc. v. Boston Five Cents Sav. Bank, 831 F. Supp. 928, 934 (D.N.H. 1993).[1]

There are two agreements involved here: 1) the loan agreement; and 2) the agreement to terminate the loan. Executive alleges that both were extensions of credit conditioned upon a prohibited tying agreement. In order to determine whether Popular has any liability, I will consider under the mechanics of Rule 56 whether each agree-

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[1] In their briefs, the parties argue over Executive's allegation that due to a previous report and recommendation on a Rule 15 motion, this court is bound by the "law of the case" to consider only three elements I mentioned there. I stated that "[a]s a general proposition" in order to recover under the Act plaintiff must plead and prove: 1) an unusual banking practice; 2) a tying arrangement; and 3) a benefit to the bank. (Docket No. 52, Report and Recommendation of August 5, 1991, page 3, adopted by the court in Docket No. 64.) It is not necessary to consider the merits of Executive's argument on the "law of the case," because in order to establish the second element, an anti-competitive tying arrangement, plaintiff must obviously prove the elements expressly established in section 1972 for prohibited tying agreements.

ment was: 1) an extension of credit; 2) conditioned upon a prohibited tying agreement; 3) not exempted under the traditional banking practices.

THE LOAN AGREEMENT

On May 3, 1983, Popular and Executive signed a loan agreement. The purpose of the same was to provide Executive with a revolving line of credit of up to the principal aggregate amount of $600,000. Executive was to use the credit to pay a debt it had with Banco Central and to finance the purchase of motor vehicles and its accounts receivable consisting of motor vehicle leasing contracts subject to annual revision upon receipt of Executive's financial statements. (See Docket No. 91, Statement of Uncontested Facts page 2; Docket No. 91, Exhibit 3, page 1.) As security for the repayment of the loan, Executive delivered to Popular a collateral which included the assignment of lease contracts, rental payments and accounts receivable as well as the personal guaranties of the individual plaintiffs and some promissory notes. (See Docket No. 91, Statement of Uncontested Facts page 2-3; Docket No. 91, Exhibit 3, page 1.)

This agreement was modified several times to increase or decrease the line of credit. On January 13, 1984, the agreement was amended to increase the line of credit, but the collateral remained the same. On July 2, 1984, and August 13, 1985, Popular renewed and increased the line of credit, but the collateral again remained the same. (See Docket No. 91, Statement of Uncontested Facts page 3-4; Docket No. 91, Exhibits 4 and 6.) On December 23, 1986, upon Executive's request, Popular reduced the line of credit, but the collateral, once again, remained the same. (See Docket No. 91, Statement of Uncontested Facts page 5-6; Docket No. 91, Exhibit 10, page 2.) Finally, Executive defaulted on the loan and this line of credit was terminated.

Extension of credit:

Executive sustains that this loan agreement was an extension of credit conditioned upon a prohibited tying arrangement. It alleges that Popular agreed to give the loan on the condition that Executive not obtain some other credit from any other banking institution in

violation of the Act's prohibition against exclusive dealing conditions (subsection (E).)

There is no issue in this case that the loan agreement was an extension of credit. Nevertheless, in order for Popular to be liable, said extension of credit must be conditioned upon a tying arrangement not exempted under applicable law.

Prohibited tying condition:

Executive alleges that in the loan agreement Popular extended credit to Executive on the condition that Executive pay and close the line of credit which it had with Banco Central Corp., and, in the future, abstain from doing business with any other bank. However, as Popular argues, the record belies Executive's allegations. There is no such provision in the loan agreement. It states only that part of the money from the loan would "be used for the payment of the balance due under certain obligations with Banco Central . . . ." (See Docket No.91, Statement of Uncontested Facts page 2; Docket No. 91, Exhibit 3, page 1.) It also states that the agreement "constitutes the entire agreement among the parties [and] . . . [n]o covenant or condition not expressed in this agreement shall affect or be effective to interpret, change or restrict this agreement. No change . . . shall be binding unless in writing." (Docket No. 91, Exhibit 3, page 17.) Nowhere does it state that Executive is required to abstain from doing business with that institution or any other.

Under Puerto Rico Rules of Evidence, extrinsic evidence concerning the terms of an agreement is excluded when an agreement is clear and unambiguous. P.R. Laws Ann. tit. 32, app. IV, R. 69(B) (1983). This principle has a statutory counterpart. Article 1233 of the Puerto Rico Civil Code provides that if the terms of a contract are clear, the literal sense of its stipulations shall be observed. P.R. Laws Ann. tit. 31, § 3471 (1991). For purposes of these provisions, a term is considered "clear" when it is sufficiently lucid to be understood to have one particular meaning, without room for doubt. Vulcan Tools of Puerto Rico v. Makita U.S.A. Inc., No. 93-2089, slip op. at 3 (1st Cir. May 4, 1994); Hopgood v. Merrill Lynch, Pierce, Fenner & Smith, 839 F. Supp. 98, 107 (D.P.R. 1993); see Marina Indus., Inc. v. Brown Boveri, 14 Official Translations of the Opinions of the Supreme Court of Puerto Rico 91, 94 (1983). Once a court determines that the terms

of a contract are sufficiently clear, the court cannot dwell on the alleged intent of the parties at the time they entered into the contract. Vulcan Tools of Puerto Rico v. Makita U.S.A. Inc., No. 93-2089, slip op. at 3-4; Hopgood v. Merrill Lynch, Pierce, Fenner & Smith, 839 F. Supp. at 107.

In the loan agreement, the only reference to another bank is in the preamble, where it states that part of the money will be used to pay a debt with Banco Central. The language there is very clear. I do not find room for doubt in the meaning of "pay a debt," nor do I find room for doubt that no term shall be binding unless expressly provided in the contract. For these reasons, I cannot dwell on Executive's allegation of a tying condition outside of the contract. Executive's allegations of such a condition is not sufficient to create a genuine issue of material facts to rebut summary judgment.

THE TERMINATION AGREEMENT

On March 2, 1988, Popular and Executive signed an agreement to terminate the loan and establish the manner of repayment of the debt in the sum of $1,424,628.99. (See Docket No. 91, Statement of Uncontested Facts page 11; Docket No. 91, Exhibit 22, page 1.)

Extension of credit:

Executive alleges that Popular "extended credit" when it agreed to accept payment of the remaining balance within ninety days. It argues that the termination agreement really was a stay, forbearance and even a new separate extension of credit. It alleges that in exchange, Popular required Executive to deliver the lease contracts an [sic] accounts receivable as partial payment in kind in violation of subsection (C).

Popular argues that this agreement did not constitute an extension of credit within the meaning of the Act. It argues that the courts that have addressed this issue have found extensions of credit only in situations where the bank restructured or refinanced the loan, as opposed to this case where the loan was terminated and there was foreclosure and repayment. See, e.g., Freidco of Wilmington v. Farmers Bank, 499 F. Supp. 995, 1001 (D. Del. 1980) (finding that a restructuring agreement is an "extension of credit") ; Nordic Bank PLC v.

Trend Group, Ltd., 619 F. Supp. 542, 554 (S.D.N.Y. 1985) (finding that forbearance is an "extension of credit"); Parsons Steel v. First Alabama Bank of Montgomery, 679 F.2d 242, 242-43 (11th Cir. 1982) (implicitly holding that refinancing is an "extension of credit"); Bruce v. First Fed. Sav. & Loan Ass'n of Conroe, 837 F.2d 712, 718 (5th Cir. 1988) (finding that refinancing is an "extension of credit").

The termination agreement in its preamble states:

> WHEREAS, the Bank and the Company entered into a Loan Agreement . . . pursuant to which the Company Executed and delivered to the Bank several promissory notes (the "Notes") which are on this date overdue and payable in full;
>
> . . .
>
> WHEREAS, [Executive] and [Popular] agreed to **terminate the Loan Agreement** and have to said effect agreed upon the manner of repayment of the Indebtment; . . . ."

Termination Agreement, Docket No. 91, Exhibit 22, page 1.

The language of this agreement is also clear. Its purpose is to terminate the agreement and establish the manner of repayment of the loan. It does not leave room for doubt as to its meaning. Moreover, I cannot find any clause in the entire agreement providing for an extension of credit.

Executive argues that to the extent that the agreement granted it additional days to pay, it constitutes an "extension of credit" within the Act. The documentary evidence in the record shows that on various occasions, including in the termination agreement, Popular granted Executive an extension of time to pay the amounts owed. (See, e.g., Docket No. 91, Exhibit 16-Letter of Rafael Blanco; Docket No. 91, Exhibit 22, page 2.) Nevertheless, Executive has failed to provide this court with any authorities to support the position that an extension of time to pay by itself constitutes an "extension of credit."

Furthermore, I find Popular's argument more persuasive. Neither the termination agreement nor all other extensions of time in-

volve any new funds, new collateral, new credit terms, or interest. To construe the concept of "extension of credit" within the context of section 1972 to include any extension of time to pay a debt is too encompassing and would only restrain banks from granting extensions of time to their customers. Therefore, neither the termination agreement nor any other extensions of time granted should be construed as an "extension of credit."

Prohibited tying condition:

Even assuming that Popular extended credit to Executive when it agreed to accept payment within ninety days, said extension of credit was not conditioned upon any "additional property" for purposes of the Act. The lease contracts and accounts receivable as partial payment in kind of an outstanding debt are not "additional property" within the meaning of the Act, irrespective of the benefit the bank may derive from them in the future. It is obvious that any extension of credit will be conditioned upon some commitment to repay. Nowhere does the termination agreement require any property for other purposes than to repay and guarantee the repayment of the then terminated loan. To that extent, even if Executive agreed to deliver property to which Popular had no previous lien, it was property of a kind "usually provided in connection with a loan." Therefore, since the property received was in payment of the loan it cannot be considered "additional property" under the Act. See Freidco of Wilmington v. Farmers Bank, 499 F. Supp. at 1002.

Executive also alleges that Popular coerced it to enter into the termination agreement by leaving no other alternative in order to avoid foreclosure. Somehow, Executive links "coercion" with a tying condition. Executive's pleadings raise many allegations against Popular of "unusual" practices, none of which are related to the threshold showing required in a section 1972 claim. For example, this allegation of coercion permeates most of its pleadings and briefs, but, as all other non-related allegations, it is irrelevant to the section 1972 claim. Therefore, it is not necessary to consider it on the merits. Cf. Dibidale of Louisiana, Inc. v. American Bank & Trust Co., 916 F.2d 300, 304-47 (5th Cir. 1990), (amended but reinstated 941 F.2d 308 (5th Cir. 1991)) (stating that a section 1972 tying condition does not require the element of coercion).

Additionally, Executive supports its allegations of duress with affidavits which state what the affiants were informed by Popular's representatives. See Docket No. 104, Exhibit F and G. However, hearsay evidence, inadmissible at trial, cannot be considered on a motion for summary judgment. Garside v. Osco Drug, Inc., 895 F.2d 46, 50 (1st Cir. 1990). Besides, more than a mere allegation of oral coercion is required to invalidate a written settlement agreement to terminate a loan. Cf. Integon Life Ins. Corp. v. Browning, 989 F.2d 1143, 1152 n.21 (11th Cir. 1993) (stating that something more than a naked and unsubstantiated allegation of oral coercion should be required to create an issue of material fact relative to whether the complaining party was coerced into purchasing the tied product or service since allowing that would undermine the force and legal effect of language in transactional documentation created by "competent attorneys in a give-and take [sic] business situation" and would be inviting "commercial chaos").

Executive has failed to raise genuine issues of material facts which could be sufficient to establish at trial that the loan agreement or the termination agreement were "extensions of credit" conditioned upon a prohibited tying agreement not exempted by law. Therefore, summary judgment is granted on the section 1972 claim. Since the federal claim was the only basis for federal jurisdiction here, the pendent claims are dismissed without prejudice for want of jurisdiction. See United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966); Rivera v. Murphy, 979 F.2d 259, 264 (1st Cir. 1992) ; Figueroa Ruiz v. Alegria, 896 F.2d 645, 650 (1st Cir. 1990). In view of the foregoing, this case is hereby dismissed. Judgment will be entered accordingly.

At San Juan, Puerto Rico, this 20th day of June, 1994.

/s/ Justo Arenas
JUSTO ARENAS
United States Magistrate Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

EXECUTIVE LEASING CORPORATION MANUAL GONZÁLEZ-GIERBOLINI AND PERSONALLY AND ON BEHALF OF THE CONJUGAL PARTNERSHIP CONSTITUTED BETWEEN THEM, Plaintiffs v. BANCO POPULAR DE PUERTO RICO AND BANPONCE CORP., Defendants	*	CASE NO. 89-0221 (HL) (JA)

AMENDED JUDGMENT

The Court, through the Honorable Magistrate Judge Justo Arenas, has entered an opinion and order on June 20, 1994 for the entry of final judgment. WHEREFORE, it is

ORDERED AND ADJUDGED that the pendent claims are hereby dismissed without prejudice for want of jurisdiction. IT IS,

FURTHER ORDERED AND ADJUDGED that this case be and is hereby dismissed.

IT IS SO ORDERED.

In Hato Rey, Puerto Rico, this 27th day of June, 1994.

LYDIA PELEGRIN
Clerk of the Court

/s/ Tere Mollfulleda
Deputy Clerk

s/cs: Harold D. Vicente
Héctor Cuebas-Tañón
Néstor Durán
Jaime Toro-Monserrate
OB

United States Court of Appeals
For the First Circuit

No. 94-1877

EXECUTIVE LEASING CORPORATION, ET AL.,

Appellants,

v.

BANCO POPULAR DE PUERTO RICO, ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
(Hon. Hector M. Laffitte, U.S. District Judge)

Before

Selya, Circuit Judge,
Bownes, Senior Circuit Judge,
and Stahl, Circuit Judge.

Harold D. Vicente, with whom Vicente & Cuebas were on brief for appellant.

Nestor Duran-Gonzalez, with whom Jaime E. Toro-Monserrate and McConnell Valdez were on brief for appellee.

February 27, 1995

BOWNES, Senior Circuit Judge. The plaintiffs, Executive Leasing Corporation, Manuel Gonzalez Gierbolini and Luz Iraida Gonzalez (both personally and on behalf of their conjugal partnership), allege that defendants Banco de Ponce (now Banco Popular de Puerto Rico, as successor-in-interest) and BanPonce Corporation (collectively, "Banco") violated various provisions of the Bank Holding Company Act (BHCA), 12 U.S.C. §§ 1971 et seq., and Puerto Rico law in their loan transactions with the plaintiffs. The district court entered summary judgment for the defendants on the BHCA claim and dismissed the pendent claims without prejudice. Executive Leasing Corp. v. Banco Popular de Puerto Rico, 1994 WL 448985 (D.P.R. June 20, 1994). The plaintiffs appeal, and we affirm.

As a threshold matter, we think that the plaintiffs seriously misconceive their burden on appeal. The plaintiffs make little effort to develop either their factual allegations or their claims of error; instead, they offer conclusory statements, undigested record citations, repeated assurances that the district court was "thoroughly briefed" on various matters, and reminders that in reviewing a grant of summary judgment, we are "free to consider the entire record." The plaintiff's brief is less a brief than an attempt to incorporate their voluminous district court pleadings by reference.[1] We have held that attorneys cannot circumvent the page limit of Fed. R. App. P. 28(g) by incorporating by reference a brief filed in another forum. Katz v. King, 627 F.2d 568, 575 (1st Cir. 1980). "If counsel desires

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[1] See, e.g., Plaintiffs' Brief at 29 ("The analysis of the extrinsic evidence controversy . . . which was proffered by Executive to the District Court deals adequately with the matter and it is incorporated by reference."); id. at 35 ("Executive explained the civil law methodology [for dealing with extrinsic evidence in cases alleging illegality or fraud] to the District Court and Executive's explanation is incorporated by reference."); id. at 41 ("Executive provided the District Court with Executive's own understanding of . . . the elements of a BHCA claim. . . . Executive respectfully directs the attention of this Court to the relevant materials, and incorporates them by reference.") (there follows a citation to forty pages of the plaintiffs' brief in opposition to summary judgment). The brief is littered with many more examples of implicit incorporation in lieu of factual and legal argument. See, e.g., id. at 31, 39, 40-41 (two examples), 43-46 (four examples).

our consideration of a particular argument, the argument must appear within the four corners of the brief filed in this court." Id. See also Hunter v. Allis-Chalmers Corp., 797 F.2d 1417, 1430 (7th Cir. 1986) (issues cannot be preserved by reference to documents filed in the district court; issues must be argued to be preserved); Prudential Ins. Co. of Am. v. Sipula, 776 F.2d 157, 161 n.1 (7th Cir. 1985) (practice of incorporation results in a composite brief of more than fifty pages; "any risk of oversight [by the court] or of the failure to present properly the arguments on appeal rests with [appellant]").

These appellate rules are wholly consistent with our de novo review of summary judgments.[2] While we view the summary judgment record in the light most favorable to the nonmoving party, and indulge all reasonable inferences in that party's favor, see, e.g., Vasapolli v. Rostoff, 39 F.3d 27, 32 (1st Cir. 1994), appellants are not excused from arguing the issues being appealed. We will not rely upon arguments and allegations that are developed only in the district court pleadings.

In light of these principles, most of the plaintiffs' appellate arguments must be deemed waived for lack of developed argumentation. See United States v. Zannino, 895 F.2d 1, 17 (1st Cir.), cert. denied, 494 U.S. 1082 (1990). We address only those arguments that have arguably been preserved.[3]

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[2] Summary judgment is appropriate when the record reflects "no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

[3] Alerted by Banco's brief to their possible waiver, the plaintiffs use their reply brief to "set forth a succinct and veridic version of the facts . . . with limited references to the documents which are part of the record." Arguments not made in the appellant's opening brief, however, are deemed waived. See, e.g., Sandstrom v. Chemlawn Corp., 904 F.2d 83, 86 (1st Cir. 1990). Moreover, the plaintiffs have not cured the defects of their opening brief. Although Banco's alleged loan agreement violations, use of "disinformation," and other anti-competitive practices may be highly relevant to the plaintiffs' claims under Puerto Rico law, the reply brief also fails to raise a genuine issue of material fact with respect to the BHCA claims.

I. FACTS

In May, 1983, Executive Leasing Corporation ("Executive") entered a loan agreement with Banco, whereby Executive obtained a line of credit for its principal business, long-term vehicle leasing. As collateral, Executive assigned to Banco the accounts receivable generated by its lease contracts. Part of the loan was to be used to discharge Executive's debt to another bank.

As a condition for the loan, Banco allegedly prohibited Executive from financing its leasing business with any other bank. This claimed exclusive dealing condition does not appear in the loan agreement. In fact, the agreement has an integration clause that provides:

> [This agreement] constitutes the entire agreement among the parties . . . . No covenant or condition not expressed in this agreement shall affect or be effective to interpret, change or restrict this agreement. No change, termination or attempted waiver shall be binding unless in writing.

The exclusive dealing condition was allegedly part of Banco's scheme to drive Executive out of business and to take over its vehicle leasing operation for the benefit of Banco's corporate affiliate, Velco, which happened to be Executive's main competitor. To that end, Banco allegedly structured Executive's line of credit to create an inherent liquidity shortage; made premature and improper charges against Executive's account; and improperly refused to extend new credit to Executive when it was not in default.

Executive eventually fell behind in its loan payments. In December, 1987, Banco called the loan. Plaintiffs claim that it did so without granting Executive a meaningful opportunity to obtain alternative financing, or placing Executive on default status as required by the loan agreement. In March, 1988, the parties entered an agreement to terminate the loan agreement. Executive agreed to transfer its main assets and all of its lease contracts — even those in which Banco had no previous interest — to Banco, allegedly for the benefit of Velco.

The plaintiffs claim that under the Bank Holding Company Act,

both the initial loan agreement and the 1988 termination agreement were extensions of credit conditioned upon a prohibited tying arrangement.

II. DISCUSSION

A. The loan agreement

The plaintiffs argue that Banco violated the BHCA by extending credit to Executive on condition that it "not obtain some other credit, property, or service from a competitor of such bank . . . ." 12 U.S.C. § 1972(1)(E).[4] Because no such restriction appears in the agreement itself, and the loan agreement, by its clear language, "constitutes the entire agreement among the parties," the district court rejected the plaintiffs' extrinsic evidence of the exclusive dealing condition, including their own sworn affidavits. See Executive Leasing, 1994 WL 448985, at *7 (citing P.R. Laws Ann. tit. 32, App. IV, R. 69(B) (1983) (Parol Evidence Rule) (evidence extrinsic to an oral or written agreement is inadmissible where "all the terms and conditions constituting the true and final intention of the parties have been included"); P.R. Laws Ann. tit. 31, § 3471 (1991) (Article 1233 of the Civil Code) ("If the terms of a contract are clear and leave no doubt as to the intentions of the contracting parties, the literal sense of its stipulations shall be observed. . . .") ; Vulcan Tools of Puerto Rico v. Makita USA, Inc., 23 F.3d 564, 567 (1st Cir. 1994) (applying Puerto Rico law; "[w]hen an agreement leaves no doubt as to the intent of the parties, a court should not look beyond the literal terms of the contract.")).

Under Puerto Rico law, an agreement is "clear" when it can "'be understood in one sense alone, without leaving any room for doubt, controversies or difference of interpretation . . . .'" Catullo v. Metzner,

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[4] Under 12 U.S.C. § 1972(1)(E), a bank may not, among other things, extend credit on the condition or requirement that "the customer shall not obtain some other credit, property, or service from a competitor of such bank . . . other than a condition or requirement that such bank shall reasonably impose in a credit transaction to assure the soundness of the credit."

834 F.2d 1075, 1079 (1st Cir. 1987) (quoting Heirs of Ramirez v. Superior Court, 81 P.R.R. 347, 351 (1959)). The plaintiffs concede that the loan agreement is clear. They argue, however, that the written agreement was not in fact the entire agreement, and that we must consider extrinsic evidence of the parties' intent with respect to integration. This argument is supported by a selective reading of Article 1233 of Puerto Rico's Civil Code, P.R. Laws Ann. tit. 31, § 3471:

> If the terms of a contract are clear and leave no doubt as to the intentions of the contracting parties, the literal sense of its stipulations shall be observed.
>
> If the words should appear contrary to the evident intention of the contracting parties, the intention shall prevail.

Relying exclusively on the second sentence quoted, the plaintiffs argue that the words of the integration clause are in fact "contrary to the evident intention of the contracting parties." Yet to consider the extrinsic evidence at all, the court must first find the relevant terms of the agreement unclear. That requirement not being met, the district court correctly went no further. See Vulcan, 23 F.3d at 564 (because the contractual term "non-exclusive" is clear and unambiguous, there is "no need to dwell on" extrinsic evidence of the supplier's alleged promise to limit the number of its distributors); Ballester Hermanos, Inc. v. Campbell Soup Co., 797 F. Supp. 103, 108 n.4 (D.P.R. 1992) (under Puerto Rico's Civil Code and parol evidence rule, parties may resort to extrinsic evidence of circumstances surrounding the document "to assist in the interpretation of an apparent conflict in the written text") (emphasis added); Nike Int'l Ltd. v. Athletic Sales, Inc., 689 F. Supp. 1235 (D.P.R. 1988) (under Article 1233 of the Civil Code, intent of the parties "is to be gleaned first from the literal terms of the contract and then, if necessary, from the circumstances surrounding its execution") (emphasis added).[5]

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[5] The plaintiffs cite several civil law treatises for the proposition that the correct methodology for determining the intention of contracting parties is "to consider, not only the written contract itself, but all other evidence which would otherwise be

The plaintiffs attempt to distinguish our decision in Vulcan Tools, 23 F.3d at 567-68, where we excluded extrinsic evidence that was offered to vary a clear and unambiguous term of the contract, on the ground that fraud and illegality were not alleged. This argument is made only by the attempted incorporation of a surreply filed with the district court; accordingly, it has been waived. In their original complaint, the plaintiffs made no allegation regarding exclusive dealing, let alone fraud. Fraud was not alleged in the amended complaint, or even in the tendered, but rejected, second amended complaint.

Even were we to reach the argument of illegality, we would reject it on the merits. The plaintiffs' extrinsic evidence was offered not to illuminate (for example) the circumstances under which the agreement was made, see R. 69(B), but to contravene an express term of the agreement. The plaintiffs have cited no authority to suggest that the illegality exception to Puerto Rico's parol evidence rule sweeps this far. The district court correctly excluded any evidence of the exclusive dealing condition.

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5 (...continued)
admissible." The admissibility of the "other evidence" under Puerto Rico law, however, depends in the first instance on the clarity of the written contract. See Vulcan Tools, 23 F.3d at 567-68; Mercado-Garcia v. Ponce Fed. Bank, 979 F.2d 890, 894 (1st Cir. 1992) (where both parties offered extrinsic evidence contradicting the clear terms of a promissory note, court is nonetheless "bound to look no further than the note itself").

We note, too, that the plaintiffs' extrinsic evidence of the actual practice of the parties would not have blocked summary judgment on their § 1972(1)(E) claim. For example, Banco tolerated Executive's repeated overdrafts and delays in payment, even though the loan agreement required Executive to pay on time. The practice of permitting late payments and overdrafts strikes us as a reasonable accommodation to Executive; it raises no genuine question regarding the integration of the agreement. As for Banco's other alleged deviations from the loan agreement, the integration clause provides that "no change . . . shall be binding unless in writing" (emphasis added). This is not a representation that there would never be any variance, however small, from the agreement. With respect to terms that the parties intended to be binding and enforceable, nothing plaintiffs have articulated on appeal leads us to doubt that the loan agreement should "be deemed as complete" under Puerto Rico's parol evidence rule. P.R. Laws Ann. tit. 32, App. IV, R. 69(B). In fact, on several occasions when Banco renewed Executive's line of credit or adjusted the terms of the loan, it did so in writing as required by the loan agreement.

B. The termination agreement

Under the BHCA, banks may not require, as a condition for extending credit, that "the customer provide some additional credit, property, or service to a bank holding company of such bank, or to any other subsidiary of such bank holding company." 12 U.S.C. § 1972 (1)(D). The plaintiffs allege that Banco violated § 1972(1)(D) by forcing Executive to surrender its vehicle leasing business to Banco for the benefit of its leasing affiliate, Velco.[6]

The plaintiffs make only a cursory argument that Executive was in fact required to provide "additional . . . property" (as opposed to the collateral for the loan) within the meaning of the BHCA. For a "detailed exposition of the facts" and the plaintiffs' legal theories, we are directed to their pleadings below. We rule that the plaintiffs' argument under § 1972(l)(D) has been waived.[7]

We turn now to two claims of procedural error, which we assess in light of their effect (if any) upon the summary judgment proceedings.

C. The second amended complaint

The plaintiffs argue that the district court abused its discretion by denying them leave to file a second amended complaint. On January 18, 1994, the district court heard arguments on the need for a stay of discovery pending Banco's motion for summary judgment on the BHCA claims. The plaintiffs gave no hint that a second amended complaint was in the offing. By order of the court, Banco was to move for summary judgment by February 7, 1994, and the trial was scheduled for April 18, 1994. On February 1, 1994, the plaintiffs unexpectedly moved for leave to file a second amended complaint. The motion remained pending when the district court entered sum-

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[6] Banco incorrectly asserts that the plaintiffs never invoked § 1972(1)(D) before the district court. In fact, references to that section appear in the plaintiffs' opposition to summary judgment.

[7] We therefore need not decide whether the workout of the loan constituted an "exten[sion of] credit" within the meaning of the BHCA.

mary judgment for Banco.

Rule 15(a) of the Federal Rules of Civil Procedure provides in part that leave to amend pleadings "shall be freely given when justice so requires." Absent factors such as undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, or "futility of amendment," the leave sought should be granted. Foman v. Davis, 371 U.S. 178, 182 (1962).

We are confident that the district court did not abuse its "considerable discretion" by implicitly rejecting the second amended complaint. Rodriguez v. Banco Central Corp., 990 F.2d 7, 14 (1st Cir. 1993). This was the second time that the plaintiffs had attempted to amend their complaint to forestall a dispositive motion (in this instance, Banco's summary judgment motion). The first motion for leave to file an amended complaint came after the original complaint was dismissed. Moreover, after nearly five years of litigation and a prior amendment of the complaint, and with the trial less than three months away, the plaintiffs made allegations for the first time against Banco Popular, the successor-in-interest to defendant Banco de Ponce, based on conduct that took place after the termination of the loan agreement — conduct that "has continued to this date." "The further along a case is toward trial, the greater the threat of prejudice and delay when new claims are belatedly added." Rodriguez, 990 F.2d at 14. Although the district court should have "state[d] explicitly its reasons for den[ying]" leave to amend, Kay v. New Hampshire Democratic Party, 821 F.2d 31, 34-35 (1st Cir. 1987), this reason for the denial is plain from the procedural history of the case: the plaintiffs were trying to prolong discovery and postpone a ruling on the summary judgment motion in the hope that "something concrete will eventually materialize . . . ." Dow v. United Bhd. of Carpenters & Joiners of Am., 1 F.3d 56, 58 (1st Cir. 1993).

The tendered complaint would have been futile in any event because it could not have blocked summary judgment on the jurisdictional BHCA claims. See Kay, 821 F.2d at 34 ("for the sole reason that [the proposed] amendment would have been futile, it was properly denied") (citing Foman, 371 U.S. at 182). On appeal, the plaintiffs point to no particular amendment that might with appropriate

discovery have raised a genuine issue of material fact.

For all of these reasons, we reject the argument that the plaintiffs should have been allowed to file a second amended complaint.

D. The stay of discovery

The plaintiffs argue that the district court abused its discretion by staying discovery during the summary judgment proceedings, and by denying their Fed. R. Civ. P. 56(f) motion for additional discovery. This argument has not been adequately developed on appeal and must be deemed waived. See, e.g., Plaintiffs' Brief at 26 ("Executive also showed, with great particularity, where discovery stood at the time. [That discussion is incorporated by reference[.] . . .]") (citing two district court pleadings). We have searched the plaintiffs' brief in vain for a showing that their discovery requests, whether those pending at the time of the stay or those made pursuant to Rule 56(f), were necessary or even relevant to their opposition to summary judgment on the BHCA claims. Again, the plaintiffs fail to address the specific manner in which they were allegedly prejudiced by the claimed error.

Double costs are assessed against plaintiffs' attorneys pursuant to Fed. R. App. P. 38. and 28 U.S.C. § 1927.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-1877

EXECUTIVE LEASING CORPORATION, ET AL.,
Plaintiffs, Appellants,

v.

BANCO POPULAR DE PUERTO RICO, ET AL.,
Defendants, Appellees.

BEFORE

SELYA, Chief Judge,
BOWNES, Senior Circuit Judge,
and STAHL, Circuit Judge.

ORDER OF COURT

Upon consideration of the plaintiffs' "Petition for Rehearing",

It is ordered that said petition for rehearing is hereby denied.

By the Court:
FRANCIS P. SCIGLIANO, Clerk

By /s/ Janice M. O'Neil
Chief Deputy Clerk

[cc: Messrs. Vicente, Duran-Gonzalez]

UNITED STATES COURT OF APPEALS
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EXECUTIVE LEASING CORPORATION, ET AL.,
Plaintiffs, Appellants,

v.

BANCO POPULAR DE PUERTO RICO, ET AL.,
Defendants, Appellees.

BEFORE

SELYA, Chief Judge,
BOWNES, Senior Circuit Judge,
and STAHL, Circuit Judge.

ORDER OF COURT

Entered: March 20, 1995

Upon consideration of the plaintiffs' "Petition for Rehearing",
It is ordered that said petition for rehearing is hereby denied.

By the Court:
FRANCIS P. SCIGLIANO, Clerk

By /s/ Janice M. O'Neil
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-1877

EXECUTIVE LEASING CORPORATION, ET AL.,
Plaintiffs, Appellants,

v.

BANCO POPULAR DE PUERTO RICO, ET AL.,
Defendants, Appellees.

ORDER OF COURT

Entered: June 22, 1995

Upon consideration of appellant's motion,

It is ordered that the mandate of this Court of March 28, 1995 is constructively recalled and reissued.

It is further ordered that the date of the order denying the petition for rehearing of Executive Leasing Corporation, Manuel Gonzalez Gierbolini, and Luiz [sic] Iraida Gonzalez be and hereby is amended or corrected nunc pro tunc to March 28, 1995.

By the Court:

/s/ FRANCIS P. SCIGLIANO
Clerk

[cc: Messrs. Downs, Vicente-Gonzalez, Duran-Gonzalez, Toro-Monserrate]

§ 1972. Certain tying arrangements prohibited; correspondent accounts

(1) A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement—

(A) that the customer shall obtain some additional credit, property, or service from such bank other than a loan, discount, deposit, or trust service;

(B) that the customer shall obtain some additional credit, property, or service from a bank holding company of such bank, or from any other subsidiary of such bank holding company;

(C) that the customer provide some additional credit, property, or service to such bank, other than those related to and usually provided in connection with a loan, discount, deposit or trust service;

(D) that the customer provide some additional credit, property, or service to a bank holding company of such bank, or to any other subsidiary of such bank holding company; or

(E) that the customer shall not obtain some other credit, property, or service from a competitor of such bank, a bank holding company of such bank, or any subsidiary of such bank holding company, other than a condition or requirement that such bank shall reasonably impose in a credit transaction to assure the soundness of the credit.

The Board may by regulation or order permit such exceptions to the foregoing prohibition as it considers will not be contrary to the purposes of the chapter.

(2)(A) No bank which maintains a correspondent account in the name of another bank shall make an extension of credit to an executive officer or director of, or to any person who directly or indirectly or acting through or in concert with one or more persons owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of, such other bank or to any related interest of such person unless such extension of credit is made on substantially the same terms, including interest rates and collateral as those prevailing at the time for comparable transactions with other persons and does not involve more than the normal risk or repayment or present other unfavorable features.

(B) No bank shall open a correspondent account at another bank while such bank has outstanding an extension of credit to an executive officer or director of, or other person who directly or indirectly or acting through or in concert with one or more persons owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of, the bank desiring to open the account or to any related interest of such person, unless such extension of credit was made on substantially the same terms, including interest rates and collateral as those prevailing at the time for comparable transactions with other persons and does not involve more than the normal risk of repayment or present other unfavorable features.

(C) No bank which maintains a correspondent account at another bank shall make an extension of credit to an executive officer or director of, or to any person who directly or indirectly acting through or in concert with one or more persons owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of, such other bank or to any related interest of such person, unless such extension of credit is made on substantially the same terms, including interest rates and collateral as those prevailing at the time for comparable transactions with other persons and does not involve more than the normal risk of repayment or present other unfavorable features.

(D) No bank which has outstanding an extension of credit to an executive officer or director of, or to any person who directly or indirectly or acting through or in concert with one or more persons owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of, another bank or to any related interest of such person shall open a correspondent account at such other bank, unless such extension of credit was made on substantially the same terms, including interest rates and collateral as those prevailing at the time for comparable transactions with other persons and does not involve more than the normal risk of repayment or present other unfavorable features.

(E) For purposes of this paragraph, the term "extension of credit" shall have the meaning prescribed by the Board pursuant to section 375b of this title and the term "executive officer" shall have the same meaning given it under section 375a of this title.

(F) Civil money penalty

(i) First tier. Any bank which, and any institution-affiliated party (within the meaning of section 1813(u) of this title) with respect to such bank who, violates any provision of this paragraph shall forfeit and pay a civil penalty of not more than $5,000 for each day during which such violation continues.

(ii) Second tier. Notwithstanding clause (i), any bank which, any institution-affiliated party (within the meaning of section 1813(u) of this title) with respect to such bank who—

(I) **(aa)** commits any violation described in clause (i);

(bb) recklessly engages in an unsafe or unsound practice in conducting the affairs of such bank; or

(cc) breaches any fiduciary duty;

(II) which violation, practice or breach—

(aa) is part of a pattern of misconduct;

(bb) causes or is likely to cause more than a minimal loss to such bank; or

(cc) results in pecuniary gain or other benefit to such party,

shall forfeit and pay a civil penalty of not more than $25,000 for each day during which such violation, practice, or breach continues.

(iii) **Third tier.** Notwithstanding clauses (i) and (ii), any bank which, and any institution-affiliated party (within the meaning of section 1813(u) of this title) with respect to such bank who—

(I) knowingly—

(aa) commits any violation described in clause (i);

(bb) engages in any unsafe or unsound practice in conducting the affairs of such bank; or

(cc) breaches any fiduciary duty; and

(II) knowingly or recklessly causes a substantial loss to such bank or a substantial pecuniary gain or other benefit to such party by reason of such violation, practice or breach,

shall forfeit and pay a civil penalty in an amount not to exceed the applicable maximum amount determined under clause (iv) for each day during which such violation, practice or breach continues.

(iv) Maximum amounts of penalties for any violation described in clause (iii). The maximum daily amount of any civil penalty which may be assessed pursuant to clause (iii) for any violation, practice or breach described in such clause is—

(I) in the case of any person other than a bank, an amount to not exceed $1,000,000; and

(II) in the case of a bank, an amount not to exceed the lesser of—

(aa) $1,000,000; or

(bb) 1 percent of the total assets of such bank.

(v) Assessment; etc. Any penalty imposed under clause (i), (ii), or (iii) may be assessed and collected—

(I) in the case of a national bank, by the Comptroller of the Currency;

(II) in the case of a State member bank, by the Board; and

(III) in the case of an insured nonmember State bank, by the Federal Deposit Insurance Corporation,

in the manner provided in subparagraphs (E), (F), (G), and (I) of section 1818(i)(2) of this title for penalties imposed (under such section) and any such assessment shall be subject to the provisions of such section.

(vi) Hearing. The bank or other person against whom any penalty is assessed under this subparagraph shall be afforded an agency hearing if such bank or person submits a request for such hearing within 20 days after the issuance of the no-

tice of assessment. Section 1818(h) of this title shall apply to any proceeding under this subparagraph.

(vii) Disbursement. All penalties collected under authority of this subsection shall be deposited into the Treasury.

(viii) Violate defined. For purposes of this paragraph, the term 'violate' includes any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

(ix) Regulations. The Comptroller of the Currency, the Board, and the Federal Deposit Insurance Corporation shall prescribe regulations establishing such procedures as may be necessary to carry out this subparagraph.

(G)(i) Each executive officer and each stockholder of record who directly or indirectly owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of an insured bank shall make a written report to the board of directors of such bank for any year during which such executive officer or shareholder has outstanding an extension of credit from a bank which maintains a corresponding account in the name of such bank. Such report shall include the following information:

(1) the maximum amount of indebtedness to the bank maintaining the correspondent account during such year of (a) such executive officer or stockholder of record, (b) each company controlled by such executive officer or stockholder, or (c) each political or campaign committee the funds or services of which will benefit such executive officer or stockholder, or which is controlled by such executive officer or stockholder;

(2) the amount of indebtedness to the bank maintaining the correspondent account outstanding as of a date not more than ten days prior to the date of filing of such report of (a) such

executive officer or stockholder of record, (b) each company controlled by such executive officer or stockholder, or (c) each political or campaign committee the funds or services of which will benefit such executive officer or stockholder;

(3) the range of interest rates charged on such indebtedness of such executive officer or stockholder of record; and

(4) the terms and conditions of such indebtedness of such executive officer or stockholder of record.

(ii) The appropriate Federal banking agencies are authorized to issue rules and regulations, including definitions of terms, to require the reporting and public disclosure of information by any bank or executive officer or principal shareholder thereof concerning any extension of credit by a correspondent bank to the reporting bank's executive officers or principal shareholders, or the related interests of such persons.

(H) For the purpose of this paragraph—

(i) the term "bank" includes a mutual savings bank;

(ii) the term "related interests of such persons" includes any company controlled by such executive officer, director, or person, or any political or campaign committee the funds or services of which will benefit such executive officer, director, or person or which is controlled by such executive officer, director, or person; and

(iii) the terms "control of a company" and "company" have the same meaning as under section 375b of this title.

(I) Notice under this section after separation from service. The resignation, termination of employment or participation, or separation of an institution-affiliated party (within the meaning of section 1813(u) of this title) with respect to such a bank (including a separation caused by the closing of such a bank) shall not affect the jurisdiction and authority of the appropriate Federal banking agency to issue any notice and proceed under this section against any such party, if such notice is served before the end of the 6-year period beginning on the date such party ceased to be such a party with respect to such bank (whether such date occurs before, on, or after August 9, 1989.)